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No. 89-1672

In the Supreme Court of the United States

OCTOBER TERM, 1990

THOMAS D. POWELL, PETITIONER

v.

WESLEY PARSONS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's *Bivens* action, arising from the search of his Swedish residence, was properly dismissed on the grounds of qualified immunity.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	4
Conclusion	6

TABLE OF AUTHORITIES

Cases:

Anderson v. *Creighton*, 483 U.S. 635 (1987)	5
Bivens v. *Six Unknown Named Agents*, 403 U.S. 388 (1971)	2
Reid v. *Covert*, 354 U.S. 1 (1957)	5

U.S. Constitution:

U.S. Const.:	
Amend. IV	3, 4, 6
Amend. V	5
Amend. VI	6

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OPINIONS BELOW

The court of appeals' summary affirmance (Pet. App. A42) is unreported. The opinion of the district court (Pet. App. A1-A40) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 22, 1990. A petition for rehearing was denied on January 24, 1990. Pet. App. A43. The petition for a writ of certiorari was filed on April 24, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On March 16, 1984, and thereafter on June 27, 1984, a federal grand jury in the Eastern District of Michigan

returned indictments charging petitioner—an American citizen, then living in Sweden—with tax evasion and narcotics trafficking (Pet. App. A16). Following the second indictment, the United States District Court for that district issued a warrant for petitioner's arrest (*ibid.*). On July 19, 1984, the United States Embassy in Stockholm, Sweden, acting pursuant to an extradition treaty between the two nations, requested the Swedish Ministry for Foreign Affairs to effect petitioner's provisional arrest, for purposes of extradition to the United States (*id.* at A16-A17). The following day, Swedish authorities arrested petitioner and thereafter searched his house, turning over various seized items to American authorities (*id.* at A17).

Petitioner was subsequently extradited to the United States, and in December 1985 he pled guilty to the charges on which he had been extradited (Pet. App. A19-A20). Prior to entering the plea, petitioner moved to suppress the evidence seized by Swedish authorities, alleging that the search of his residence had been unlawful. The United States District Court for the Eastern District of Michigan did not rule on that motion, and in petitioner's subsequent plea agreement he expressly waived the right to appeal the suppression issue. *Id.* at A20-A22.

2. On June 24, 1986, petitioner filed a damages action in the United States District Court for the District of Columbia, pursuant to *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971) (Pet. App. A1). Petitioner alleged that 12 federal officials had violated his Fourth and Fifth Amendment rights by conspiring to dupe Swedish authorities into conducting an unreasonable search of his residence in Sweden (*ibid.*). The district court initially dismissed the complaint for failure to state a claim, but the court of appeals reversed, holding that the complaint had an arguable basis in law and fact (*id.* at A1-A2). Following the remand to the district court, the government, on behalf

of the individual respondents, moved for dismissal of the complaint or, in the alternative, for summary judgment (*id.* at A2).

On April 6, 1989, the district court granted summary judgment for respondents (Pet. App. A1-A40). At the outset, the court agreed with petitioner that the guarantees of the Bill of Rights generally protect United States citizens abroad (*id.* at A8-A9). The court also assumed, for purposes of the motion, that petitioner had sufficiently shown that the search of his house was a "joint venture" (*id.* at A12) between American and Swedish authorities, thus implicating Fourth Amendment protections (Pet. App. A25-A34). The court nevertheless rejected petitioner's claim on qualified immunity grounds, finding that "an objective official in the [respondents'] position under the circumstances would have every reason to believe that the Swedish authorities would act within the law in carrying out the request to search [petitioner's] residence" (*id.* at A34-A35). The court noted that the American Embassy had requested that petitioner's house be searched at the very same time that petitioner was arrested (*id.* at A35-A36). Under the circumstances, the court concluded, respondents had every reason "to believe that the search of the house would be incident to the arrest" (*id.* at A37)—thus obviating the need for a search warrant. In addition, the court stated, American officials had given Swedish authorities "ample information to justify, under American law, the issuance of a search warrant," and "it was certainly objectively reasonable for [respondents] to believe that this information would support the issuance of a local warrant" (*id.* at A37-A38). The court concluded that "given the Swedish authorities' otherwise strict adherence to their laws in dealing with [petitioner], it was objectively reasonable to believe that a local warrant would, in fact, be issued" (*id.* at A38). "In sum," the court held, respondents "are entitled to

qualified official immunity to [petitioner's] claims even if Swedish officials acted as [respondents'] agents, and even if the search as it was * * * executed somehow violated the Fourth Amendment, because it was objectively reasonable for the [respondents] to believe the search would be legal" (*id.* at A39). The court of appeals summarily affirmed "substantially for the reasons stated by the district court" (*id.* at A42).

ARGUMENT

1. Petitioner asks (Pet. 10-12) this Court to resolve the question whether the Fourth Amendment applies to an overseas search of the premises of a United States citizen. That question, however, is not presented in this case. In its decision, summarily affirmed by the court of appeals, the district court expressly agreed with petitioner that the Bill of Rights generally protects American citizens abroad (Pet. App. A8-A9), and the court assumed, for purposes of the motion, that the Fourth Amendment applied on the specific facts of this case (Pet. App. A34). Although the district court nonetheless dismissed petitioner's action, it did so on qualified immunity grounds, not because it rejected petitioner's invocation of the Fourth Amendment.

Petitioner cites (Pet. 10) the district court's statement that "the general rule is that the Fourth Amendment is not implicated at all in searches and seizures in foreign countries by foreign authorities, even where the rights of American citizens are involved." But petitioner misreads that statement. In that passage, the district court made the wholly uncontroversial point that a search "by foreign authorities" is not ordinarily chargeable to American officials, and thus cannot implicate the Fourth Amendent. From that "general rule" (Pet. App. A11), the court noted that there are "two exceptions"—first, for searches that "shock the judicial

conscience"; and second, for searches that are conducted as "joint ventures" between the United States and foreign officials (*id.* at A11-A12). The court then assumed that the second exception applied in this case, and it therefore analyzed petitioner's claim on the premise that he was protected by the Fourth Amendment (Pet. App. A34).

2. Petitioner also contends that this Court's decision in *Reid* v. *Covert*, 354 U.S. 1 (1957), forecloses a defense of qualified immunity in this case. In particular, he asserts, *Reid* "clearly established a United States citizen's right to constitutional protection, even if residing in a foreign country" (Pet. 13). Accordingly, petitioner states, "[a] reasonable thinking person would have been put on notice [that] * * * he must comply with the constitutional mandate" (*ibid.*), thus depriving that person of qualified immunity. There is no merit to that claim.

In *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987), this Court held that in order to overcome a defense of qualified immunity, a *Bivens* plaintiff must show that "[t]he contours" of the right allegedly violated were "sufficiently clear that a reasonable official would understand that what he is doing violates that right." The Court emphasized that the "right" which must be "clearly established" cannot be defined at too high a level of generality. For example, the Court explained, in the Fourth Amendment context, a law enforcement official does not forfeit the right to qualified immunity simply because it is "firmly established that warrantless searches not supported by probable cause and exigent circumstances violate the Fourth Amendment." 483 U.S. at 641. Instead, the Court stated, "[t]he relevant question * * * is the objective (albeit fact-specific) question whether a reasonable officer could have believed [the particular] warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed." *Ibid.*

The *Reid* case does not in any respect undercut respondents' reasonable belief that the search of petitioner's house was lawful. In the first place, *Reid* did not involve the Fourth Amendment at all. The case instead concerned the Fifth and Sixth Amendment rights of civilian dependents of military personnel in court-martial proceedings overseas. Still less did *Reid* provide a rule of decision for an overseas search and seizure in a context similar to the present case – where American officials had every reason to believe that the search would be incident to a lawful arrest, and had furnished the foreign authorities with ample basis to secure a local search warrant. In short, nothing in *Reid* undermines the finding of the courts below that "it was objectively reasonable for the [respondents] to believe the search would be legal" (Pet. App. A39). The courts' factbound conclusion that respondents were entitled to qualified immunity warrants no further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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* The Solicitor General is disqualified in this case.

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